critical technological and scientific progress,[7] interfering with the efficiency of the marketplace,[8] and breeding paranoia.[9]

Indeed, this is the lesson of the inquiries concerning the September 11 attacks on the United States: better information dissemination will empower the public and enable agencies to better protect national security. It was directly addressed by Eleanor Hill, Staff Director, Joint House-Senate Intelligence Committee Investigation into September 11 Attacks, who explained in a Staff Statement summarizing the testimony and evidence,

> [T]he record suggests that, prior to September 11th, the U.S. intelligence and law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort: an alert and committed American public.

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documents are more of an embarrassment than a secret, the public should know of our government's treatment of individuals captured and held abroad.").

[7] *See, e.g.*, Nat'l Acad. of Sciences, *Seeking Security: Pathogens, Open Access, and Genome Databases* 54-57 (2004), http://www.nap.edu/books/0309093058/html/52.html ("[A]ny policy stringent enough to reduce the chance that a malefactor would access data would probably also impede legitimate scientists in using the data and would therefore slow discovery. . . . It is possible that the harm done during a process of negotiating such an agreement – through building walls of mistrust between peoples – would be greater than the benefit gained through the sense of security that such a regime might provide. . . . There is some concern that restricting access to this information might lead to a situation in which the mainstream scientific community is unaware of dangers that may threaten us.").

[8] *E.g.*, Aaron Edlin & Joseph E. Stiglitz, *Discouraging Rivals: Managerial Rent-Seeking and Economic Inefficiencies*, 85 Am. Econ. Rev. 1301 (1995).

[9] *See* Kennedy Assassination Records Review Bd., *Final Report* 1 (1998), http://www.archives.gov/research/jfk/review-board/report/ ("30 years of government secrecy relating to the assassination of President John F. Kennedy led the American public to believe that the government had something to hide.").

> One needs look no further for proof of the latter point than the heroics of the passengers on Flight 93 or the quick action of the flight attendant who identified shoe bomber Richard Reid.[10]

This conclusion is echoed in the Report of the National Commission on Terrorist Attacks on the United States ("9/11 Commission"), which includes only one finding that the attacks on the World Trade Center and the Pentagon might have been prevented. According to the interrogation of the hijackers' paymaster, Ramzi Binalshibh, if the organizers – particularly Khalid Sheikh Mohammed – had known that the so-called 20th hijacker, Zacarias Moussaoui, had been arrested at his Minnesota flight school on immigration charges, then Bin Ladin and Mohammed would have called off the 9/11 attacks.[11] News of that arrest might also have alerted the FBI agent in Phoenix who warned of Islamic militants in flight schools in a July 2001 memo. Instead that memo vanished into the FBI's vaults in Washington and was not connected to Moussaoui in time to prevent the attacks.[12] The Commission's wording on this issue is important: only "publicity . . . might have derailed the plot."[13] Disclosure of security-related information may reduce risk by alerting the public to threats and

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[10] *Intelligence Community's Response to Past Terrorist Attacks Against the United States from February 1993 to September 2001: Hearing Before the J. H./S. Intelligence Comm.*, 107th Cong. (2002) (Joint Inquiry Staff Statement, Eleanor Hill, Staff Dir.), http://intelligence.senate.gov/0210hrg/021008/hill.pdf.

[11] National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, 247, 276 & 541 n. 107 (2004), http://www.9-11commission.gov/.

[12] *See Joint Investigation Into September 11th: Hearing Before the J. H./S. Intelligence Comm.*, 107th Cong. (2002), http://intelligence.senate.gov/0209hrg/020924/hill.pdf (Joint Inquiry Staff Statement, Eleanor Hill, Staff Dir., on "The FBI's Handling of the Phoenix Electronic Communication and Investigation of Zacarias Moussaoui Prior to September 11, 2001.")

[13] *The 9/11 Commission Report*, *supra* note 11, at 276.

enabling better-informed responses from both local and federal agencies.

The rationale behind the nation's central openness law, the Freedom of Information Act, 5 U.S.C. § 552, reflects the notion that sharing information with the public will help, not harm, society. The FOIA mandates complete openness, with only carefully delineated exemptions from that general rule. *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). In enacting the law, Congress sought to "enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities," *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 17 (1974) (internal quotes omitted), and to prevent the damage that pervasive secrecy in government agencies did to public confidence in their Government. *See* S. Rep. No. 813 (1965), as reprinted in S. Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles*, S. Doc. No. 93-82, at 45 (1974) [hereinafter *FOIA Sourcebook*] ("A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.").

The benefit recognized by Congress is that informed democratic participation ensures that elected officials make decisions in our national security interest. As Luther Gulick, a high-level Roosevelt administration official during World War II, observed, despite the apparent efficiencies of totalitarian political organizations, democracy and expressive freedom gave the United States and its democratic allies an important competitive advantage because public debate encouraged wise policy choices.[14]

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[14] Cass R. Sunstein, *Why Societies Need Dissent* 8 (2003) (citing Luther Gulick, *Administrative Reflections from World War II* 121-29 (1948)).

And the necessary corollary to this point – that secrecy can interfere with informed decisionmaking in areas of foreign and national security policy – is true as well. For example, as Senator Daniel Patrick Moynihan concluded in *Secrecy: The American Experience*, the Cold War and related arms race were greatly exacerbated by the secrecy imposed by the military establishment. *Id.* at 154-77 (1998).

Overclassification and unneeded secrecy also undermine the effort to keep truly sensitive information secret, "[f]or when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or careless, and to be manipulated by those intent on self-protection or self-promotion." *New York Times Co.*, 403 U.S. at 729 (Stewart, J., concurring). Indeed, this is the same conclusion reached by the ISOO in its 2002 Report to the President:

> Much the same way the indiscriminate use of antibiotics reduces their effectiveness in combating infections, classifying either too much information or for too long can reduce the effectiveness of the classification system, which, more than anything else, is dependent upon the confidence of the people touched by it. While there is always a temptation to err on the side of caution, especially in times of war, the challenge for agencies is to similarly avoid damaging the nation's security by hoarding information.[11]

Moreover, government transparency is a central principle of democracy. As Secretary of Defense Donald Rumsfeld recognized in a recent op-ed in the *Wall Street Journal*, "[a]s more citizens gain access to new forms of information, to new ways of learning of the outside world, it will be that much more difficult for governments to cement their [anti-democratic] rule by holding monopolies on news and commentary." Donald Rumsfeld, *War of the*

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[11] ISOO, *Report to the President* 7 (2002), http://www.archives.gov/isoo/reports/2002-annual-report.pdf.

Worlds, Wall St. J., July 18, 2005, at A12. This is consistent with the international consensus that the right to know about the activities of government is a fundamental human right.[16]

b. Secrecy Has Grown Exponentially Over the Last Four Years and Government Officials Admit That Much of it is Unnecessary.

Over the past four years there has been a dramatic upsurge in government secrecy. Classification has multiplied, reaching an all-time high of 15.6 million classification actions in 2004, nearly double the number in 2001.[17] Moreover, the cost of the program has skyrocketed from an estimated $4.7 billion in 2002 to $7.2 billion in 2004.[18]

Officials from throughout the military and intelligence sectors have admitted that much of this classification activity is unnecessary. Secretary of Defense Donald Rumsfeld recently acknowledged the problem of overclassification: "I have long believed that too much material is classified across the federal government as a general rule. . . . "[19] The extent of over-classification is significant. Under repeated questioning from members of Congress at a 2004 hearing concerning over-classification, Deputy

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[16] *See* Universal Declaration of Human Rights, art. 19, Dec. 10, 1948, UN Resolution 217A(III); African Charter on Human and Peoples' Rights, art. 9, June 26, 1981; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950; American Convention on Human Rights, art. 13, Nov. 22, 1969; Inter-American Comm'n on Human Rights, Declaration of Principles on Freedom of Expression, para. 4, Oct. 19, 2000.

[17] ISOO, *2004 Report to the President* 3 (2005), http://www.archives.gov/isoo/reports/2004-annual-report.pdf.

[18] ISOO, *2004 Report on Cost Estimates for Security Classification Activities for 2004* 3 (2005), http://www.archives.gov/isoo/reports/2004-cost-report.pdf; ISOO, *2001 Report to the President* 9 (2002), http://www.archives.gov/isoo/reports/2001-annual-report.pdf.

[19] Donald Rumsfeld, *War of the Worlds*, Wall St. J., July 18, 2005, at A12.

Secretary of Defense for Counterintelligence and Security Carol A. Haave eventually conceded that approximately 50 percent of classification decisions are over-classifications.[20] These opinions echoed that of now-CIA Director Porter Goss, who told the 9/11 Commission, "we overclassify very badly. There's a lot of gratuitous classification going on, and there are a variety of reasons for them."[21]

Former Solicitor General of the United States Erwin Griswold, who led the government's fight for secrecy in the Pentagon Papers case, acknowledged some of the reasons:

> It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.[22]

At the same time that unnecessary classification has surged, a number of new laws have been enacted post-September 11 creating new categories of secret information. These include, among others: the critical

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[20] *Subcommittee on National Security, Emerging Threats and International Relations of the House Committee on Gov't Reform Hearing*, 108th Cong. (2004) (testimony of Carol A. Haave), http://www.fas.org/sgp/congress/2004/082404transcript.pdf; *see id.* (Testimony of J. William Leonard, Director of ISOO) ("It is no secret that the government classifies too much information.").

[21] *9/11 Commission Hearing*, (Testimony of then Chair of the House Permanent Select Committee on Intelligence, now Director of Central Intelligence, Porter Goss) (2003), http://www.9-11commission.gov/archive/hearing2/9-11Commission_Hearing_2003-05-22.htm#panel_two.

[22] Erwin N. Griswold, *Secrets Not Worth Keeping: The courts and classified information*, Wash. Post, Feb. 15, 1989, at A25.

infrastructure information provisions of the Homeland Security Act of 2002, 6 U.S.C.S. § 133 (2005); the so-called gag order provisions of Section 215 of the Patriot Act, 50 U.S.C.S. § 1861 (2005); and the revisions to the sensitive security information provisions of the Air Transportation Security Act. 49 U.S.C.S. §§ 114(s), 40119 (2005).

The government also has expanded its use of the "mosaic" theory of intelligence gathering to a level never before seen, perhaps finally falling down the "'slippery slope'" "lurking in the background of the [mosaic] theory" that the Third Circuit recognized in *American Friends Service Committee v. Department of Defense*, 831 F.2d 441, 445 (3d Cir. 1987). The mosaic theory rests on the claim that innocuous bits of information can be combined to pose a risk to national security. Several courts have highlighted the risks attendant to the theory. For example, in *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 709 (6th Cir. 2002), the court struck down the blanket closure of immigration hearings and cautioned:

> The Government could use its 'mosaic intelligence' argument as a justification to close any public hearing completely and categorically, including criminal proceedings. The Government could operate in virtual secrecy in all matters dealing, even remotely with 'national security,' resulting in a wholesale suspension of First Amendment rights.

And, as in this case, the government appears to be expanding use of a potentially more powerful litigation tactic – motions to dismiss lawsuits on the basis of state secrets privilege. "In the twenty-three years between the decision in [*United States v. Reynolds*, 345 U.S. 1 (1953)] and the election of Jimmy Carter, in 1976, there are four reported cases where the government invoked the privilege. Between 1977 and 2001, there are a total of fifty-one reported cases where courts ruled on invocation of the

privilege."[23] In the three and one-half years since then, there have been at least six district court decisions and seven court of appeals decisions concerning the privilege that resulted in written opinions.[24] Because it prevents any judicial inquiry into the merits of the underlying claims, invocation of state secrets privilege has been a successful litigation tactic.

The government does not have an incentive to check abuse of the privilege. In cases such as Ms. Edmonds', the termination of the lawsuit ends public inquiry into allegations of mismanagement or malfeasance, as well as any governmental liability. The Government has an interest instead in preserving such secrecy; it permits the Government to pursue unimpeded its aims.

The government's penchant for overclassification is particularly troubling in the context of this case, where it is being used not only to retroactively classify information that already is widely disseminated, but also to prevent a person from exercising the right to bring a lawsuit to vindicate her claim that she was wrongfully discharged in violation of her First and Fourth Amendment rights and that her rights under the Privacy Act were violated.

c. Meaningful Judicial Review of Government Secrecy is Necessary to Prevent Overreaching.

When there is an absence of internal and external checks against government misconduct, the judiciary is critically necessary to protect against overreaching.

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[23] William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 Pol. Sci. Q. 85, 101 (2005). Indeed, it has proven difficult to ascertain the breadth of circumstances when the state secrets privilege has been invoked. *See id.* at 111 (describing lack of any success in efforts to obtain policy guidance on use of state secrets privilege from three dozen agencies and their sub components).

[24] Based on a search in LexisNexis Academic Universe conducted on September 2, 2005.

Our nation's experience when extreme secrecy has been invoked in the past is that secrecy can stem from many motives – some legitimate and some possibly illegitimate. The government has no independent incentive to separate out the illegitimate incentives. This certainly is the lesson of cases such as *Korematsu v. United States*, 323 U.S. 214 (1944), and *New York Times Co.*, 403 U.S. 713, which demonstrate the danger of a doctrine of deference that precludes dispositive counterarguments and prompts judges to decline substantive review of agencies' positions.

Korematsu concerned an order that directed the exclusion from the West Coast of all persons of Japanese ancestry. It was held constitutional. In that case, the Court's finding of "military necessity" was based on the representation of government lawyers that Japanese Americans were *committing espionage and sabotage* by signaling enemy ships from shore. Documents later released under FOIA revealed that government attorneys had suppressed key evidence and authoritative reports from the Office of Naval Intelligence, the FBI, the Federal Communications Commission, and Army intelligence that flatly contradicted the government claim that Japanese Americans were a threat to security. *Korematsu v. United States*, 584 F. Supp. 1406, 1416-19 (N.D. CA 1984). Had the court required an explanation of the evidence to support the central rationale for interning thousands of Japanese Americans, it would have learned that there was no evidence and would have been able to discern what likely was the true rationale for the policy. The complete deference granted to the government in *Korematsu* – without any effort to ensure the veracity of the government's claims – undermined accountability.

New York Times Co. involved an effort to enjoin *The New York Times* and *Washington Post* from publishing a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" ("Pentagon Papers"). As with *Korematsu*, review of the materials shielded by government secrecy demonstrates that the motivation behind the secrecy was not protection of national security. The Pentagon Papers described a series of misrepresentations and

poor policy decisions concerning the Vietnam War. They were improperly leaked. As former Solicitor General Erwin Griswold eventually admitted: "I have never seen any trace of a threat to the national security from publication. Indeed, I have never seen it suggested that there was such an actual threat."[28] The Supreme Court denied the Government's efforts to enjoin publication by newspapers. Had the Pentagon Papers not been leaked, there would have been no First Amendment clash to resolve – secrecy for the purpose of covering up government misrepresentations would have triumphed.

Even *United States v. Reynolds*, 345 U.S. 1 (1953), the case in which this Court endorsed the state secrets privilege, illustrates the tendency of government to give in to the lure of secrecy and overly deferential judicial review. *Reynolds* was a tort lawsuit brought by widows of three civilians killed in a crash of an Air Force plane. The plaintiffs sought in discovery the official accident investigation report. The District Court ordered the government to produce the document and when the Air Force refused, entered an order finding in the plaintiffs' favor on the merits of the suit. The Court of Appeals affirmed the ruling. The Supreme Court reversed.

In 2000, the daughter of one of the deceased civilians obtained the declassified accident investigation report when researching the incident on the Internet. The claim of privilege in 1953 was based on the fact that the aircraft was involved in a "confidential mission" and "carried confidential equipment." *Herring v. United States*, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *17 (E.D. Pa. Sept. 10, 2004). Today we know that the accident report at issue in Reynolds contained no details about secret military equipment. *Id.* at *26 (noting that the accident report does not refer to newly developed or secret electronic equipment).

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[28] Griswold, *supra* note 22, at A25.

While it is likely that there always will be some sensitive security information in a case involving a secret military mission, just as in any case relating to an employee of a military, intelligence, or law enforcement agency, such claims should not be simply taken on faith. Had the Supreme Court permitted the lower court to require an *in camera* review of the accident investigation report, it would have enabled the court to ask the military to explain its rationale. Even if the court would have upheld the state secrets privilege on that explanation, the decision to extinguish a plaintiff's legal rights would have been based on the actual rationale for the secrecy, and not on a vague claim that the matter involved a secret mission. Certainly, the need to explain itself to a federal court has a salutary effect on the actions of the government.

Similarly, Ms. Edmonds' case raises signals that the government may be overreaching. First, there is evidence that there may be some legitimacy to Ms. Edmonds' claims. The Justice Department's Inspector General concluded that Ms. Edmonds' allegations "were, in fact, the most significant factor in the FBI's decision to terminate her services." DOJ OIG Report, *supra* note 2, at 31. In addition, Ms. Edmonds' allegations triggered widespread concern by Members of Congress and the acknowledgment by the FBI that some of Ms. Edmonds' allegations "were not unfounded." Petr.'s Br. at 3.

Second, much of the information surrounding Ms. Edmonds' allegations and the government's response to them was in the public domain and widely disseminated *before* the government engaged in a retroactive classification as a predicate for invoking the state secrets privilege. Despite the retroactive classification, no effort was made to regain control over the information. In addition, the publicly-released Justice Department Inspector General's report included many details of Ms. Edmonds' employment and allegations.

These facts send a danger signal that strongly suggests that the classification on which the government rests its assertion of the state secrets privilege would not have

occurred but for the Government's desire to use the state secrets privilege as a litigation tactic to deprive Ms. Edmonds of the right to prove in court what the Inspector General has found – namely, that her allegations were the "most significant factor in the FBI's decision to terminate her services."

In cases such as these, the courts are the only branch that can act as a check against government overreaching. Congress is limited in terms of the breadth, speed, and frequency with which it can perform oversight. Yet, the lower courts act as though they are disempowered because classified information may be involved in the case. There is no doubt that any individual working in a job like Ms. Edmonds' – an FBI translator who translated intercepted communications – would come into contact with classified information. Yet, that alone does not mean that Ms. Edmonds should be denied her day in court. Nonetheless, the Government's position in this case sends a clear message to all government personnel who work on national security matters – there is no protection for you if you blow the whistle on wrongdoing.

Acquiescence by the judiciary to such overbroad assertions of secrecy is not mandated by our constitutional system. The U.S. Constitution itself contains only one specific mention of secrecy, in Article I, Section 5, which states:

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

U.S. Const. art. I, § 5. Thus, the Constitution compels publicity for Congress's proceedings and accountability for its actions, with secrecy as the exception that proves the rule. The Executive's power to keep information secret is not mentioned in the Constitution, but is derived from the Article II powers vested in the President as

commander-in-chief and as maker of treaties (with the advice and consent of the Senate).[26]

The constitutional system of checks and balances does not permit the executive branch to act beyond the accountability of the judiciary. As the Supreme Court reminded the executive branch when it mandated due process for enemy combatants, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 603 (2004) (O'Connor, J., plurality opinion).

Congress also has acknowledged the judiciary's constitutional role in policing executive claims of secrecy. In a definitive pronouncement on the issue, Congress overturned *EPA v. Mink*, 410 U.S. 73 (1973), with the 1974 amendments to the FOIA, 5 U.S.C. § 552. President Ford vetoed the amendments based on his view that it would be unconstitutional for a judge to decide whether a record was properly classified.[27] Congress overrode that veto, ensuring that the FOIA explicitly provides for judges to conduct *in camera* review of records despite the Government's assertion of national security. This authority was given to judges to safeguard against arbitrary, capricious, and myopic use of the awesome power of the classification stamp by the government bureaucracy. S. Rep. No. 93-854 (1974), as reprinted in *FOIA SourceBook*, at 183.

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[26] U.S. Const. art. II, § 2. These significant presidential powers are balanced by congressional authority to "provide for the common Defence," *id.* art. I, § 8, cl. 1; "declare War . . . and make Rules concerning Captures on Land and Water," *id.* cl. 11; "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14; advise in and consent to the making of treaties, *id.* art. II, § 2, cl. 2; "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by th[e] Constitution in the Government of the United States," *id.* art. I, § 8, cl. 18; and insist that "[n]o money shall be drawn from the Treasury, but in consequence of Appropriations made by Law." *Id.* § 9, cl. 7.

[27] Veto Message from President Ford to the House of Representatives (Oct. 17, 1974), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB142/101774%20Veto%20Message.pdf.

Nor has Congress made any effort to preclude claims such as those brought by Ms. Edmonds. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). Indeed, *Webster* admonished that a "serious constitutional question" would arise if consideration of Doe's constitutional claims were foreclosed. *Id.* It follows that executive branch efforts to proscribe judicial review of such claims must be examined with great care. *See, e.g., Reynolds*, 345 U.S. at 9-10 ("[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."); *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) ("[A] court must not merely unthinkingly ratify the executive's assertion of absolute privilege, lest it inappropriately abandon its important judicial role."). This failure is a serious one. Before accepting the executive branch's claim of state secrets privilege, the court must scrutinize the basis for the claim.

The courts are certainly competent to scrutinize the need for secrecy and to use the substantial array of procedures available to a court to permit the use of classified information without its revelation to the public. The Supreme Court's intervention is necessary to make clear to the lower courts that an executive claim of secrecy does not render a matter non-justiciable. Instead, courts are to use all of the tools available to fulfill their constitutional duty to resolve disputes.

Since *Reynolds*, unquestioning judicial acquiescence to assertions of the state secrets privilege has been the rule rather than the exception, despite *Reynolds* clear direction that courts have an important role to play in assessing the Government's privilege claims. For this reason, this Court's intervention is needed to explain to lower courts what that scrutiny involves.

CONCLUSION

For the foregoing reasons and the reasons set forth in Petitioner's Brief, the Court should grant a writ of certiorari.

DATED: October 10, 2005

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In the

Supreme Court of the United States

SIBEL EDMONDS,

Petitioner,

v.

DEPARTMENT OF JUSTICE, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, BLOOMBERG NEWS, CABLE NEWS NETWORK LP, LLLP, DAILY NEWS L.P., LOS ANGELES TIMES COMMUNICATIONS LLC, THE NEW YORK TIMES CO., REUTERS AMERICA LLC, SOCIETY OF PROFESSIONAL JOURNALISTS, AND THE WASHINGTON POST CO. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, described more fully in Appendix A, are journalists who report on matters of public concern, and journalism organizations that represent journalists. This case concerns an issue critical to the media specifically and the public in general: whether the public has a presumptive right of access to appellate court proceedings of significant public importance.

As cases stemming from the War on Terrorism move through our courts, the distinction between the public interest in access to criminal versus civil cases becomes less relevant. Some of the more important developments are occurring in the civil context, such as the suits brought against the government by individuals implicated in the anthrax attack investigation, espionage investigations at nuclear facilities, and, in the present case, allegations of improper activities within the Federal Bureau of Investigation.

It is imperative that this Court accept review to clarify that the presumptive public right of access applies to these controversies.

Each of the amici parties has an interest in protecting and preserving the news media's ability to report to the public on matters of public concern.

STATEMENT OF FACTS

Amici rely on the summary of the facts presented by petitioner, but emphasize that the facts relevent to this brief are those involving the closure of the appellate proceeding on

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

April 21, 2005.

The day before oral arguments were to be held, the U.S. Circuit Court of Appeals for the District of Columbia announced that the argument would be sealed from the press and public, despite the fact that neither party had moved for closed arguments and both parties had filed public briefs. *See Petition for Certiorari* at 13. The court then rebuffed two motions for access to the proceedings filed by a news media coalition and public interest groups, again with no explanation or justification of the need for closure. App. 3a.

SUMMARY OF ARGUMENT

Amici argue that the second question presented for review, concerning the denial of public and press access to the proceedings, merits review by this Court. A number of federal and state appellate courts recognize a presumptive right of access in circumstances similar to or — given the important public interests at stake here — even less important than in the present case. Recognition of a *presumptive* right, of course, does not settle the issue of access, but instead allows closure if the court identifies a compelling governmental interest that will be jeopardized and narrowly tailors a closure order to satisfy that interest. Other federal circuit courts manage to operate under such a standard, even in cases involving state secrets in terrorism investigations.

In *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny, this Court looked in part to public policy arguments when it established the First Amendment right-of-access framework for criminal trials. In the 25 years since the Court issued *Richmond Newspapers*, a plethora of federal and state appellate courts have looked to those same public policy arguments in finding that the right of access also applies to civil litigation. Indeed, a number of courts have

specifically found a right of access to appellate oral arguments where the cases involve national security issues.

This Court's decisions make clear that a presumption of access applies to criminal cases, and that a court can overcome that presumption only by allowing the public an opportunity to be heard before closure and then issuing specific findings of fact showing that a compelling government interest justifies denying access and that the denial of access is narrowly tailored to achieve that goal. The presumption of openness and procedural safeguards have been extended to civil cases as well.

In this case, the Court of Appeals did not acknowledge the public's right of access to attend the appellate argument. It issued no findings of fact that attempted to justify its closure of the court and its decision to disregard the constitutional right of access. And it did not explain how its remedy — complete closure of the courtroom — constituted a narrowly tailored solution to the situation.

The D.C. Court of Appeals is attempting to allow the closing of broad categories of civil litigation from the public, and by doing so it has abridged the public's First Amendment rights.

ARGUMENT

I. The important public policy concerns underlying this Court's recognition of a First Amendment right of access in the criminal trial context are even more evident in the present case.

This Court's review is essential in the present case so that lower courts will know they cannot completely deny access to an appellate proceeding in a civil case of great public importance without justifying that closure in written findings that identify a compelling governmental interest and limit closure to the extent necessary to protect that interest.

In establishing the public's presumptive constitutional right of access to attend criminal trials, discussed *infra* at II, this Court has discussed the public policy reasons supporting access. Those reasons include, but are not limited to, the following: that openness ensures the accountability of our justice system, improves the functioning of a trial, provides an outlet for public concern, improves the public's understanding and acceptance of the judicial system, improves informed public debate, fosters an appearance of fairness, and permits the public to serve as a check on the judicial process.

These public policy factors also favor a presumptive right of access to civil appellate arguments. For better or worse, many of the most critical public policy battles are now fought through civil litigation. The front pages of America's newspapers are filled with stories about whistleblower litigation against employers, product liability litigation against cigarette companies and automobile manufacturers, toxic tort litigation against chemical manufacturers, class action lawsuits concerning breast implants, and wrongful death lawsuits against people acquitted of criminal murder charges. This phenomenon is hardly new. As this Court noted in discussing the history of civil rights litigation, "[I]n some civil cases the

public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases." *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.15 (1979).

Furthermore, most of the concerns that justify closure of trial court proceedings — such as pretrial publicity that will influence jurors or interfere with the fair trial rights of a criminal defendant — do not apply to appellate proceedings.

Cases against the federal government that include claims under the Privacy Act, 5 U.S.C. § 552(a), such as the present case, present an even greater issue of public importance. The plaintiff alleges that the government, in defending its actions against charges of retaliation for exposing espionage within the FBI, released information to the public that it was not allowed to release under the Act. Such Privacy Act claims have been among the most controversial court actions in recent years, covering topics ranging from wrongful termination to the anthrax attacks and espionage at Los Alamos labs. These claims go to the heart of government accountability to the people because they involve both government statements to defend its own actions and individual claims of illegal retaliation by the government.

If the U.S. Court of Appeals for the District of Columbia circuit's decision to close the courtroom with no opportunity to be heard and no written finding justifying closure is allowed to stand, members of the public could be excluded from any broad category of cases that would facilitate public review of government conduct and would never understand when the government's interest in protecting state secrets outweighs the public's right to access. Under the Court of Appeals' reasoning, Circuit Courts need not articulate the reasons for denying the public's First Amendment right of access to civil appellate proceedings that concern fundamental issues of governance.

II. This Court recognizes the public's First Amendment right of access to criminal cases.

This Court has held that the public has a First Amendment right of access to attend criminal trials and related criminal proceedings. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) ("The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials.")

In subsequent cases that clarified when the presumption of access attaches, the Court first "considered whether the place and process have historically been open to the press and the general public." *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 8 (citing *Globe Newspaper*, 457 U.S. at 605 and *Richmond Newspapers*, 448 U.S. at 589). Second, it "considered whether public access plays a significant positive role of the functioning of the particular process in question." *Id.* (citing *Globe Newspaper*, 457 U.S. at 606).

In *Richmond Newspapers* and its progeny, this Court has established procedural requirements that must be carried out before closing a courtroom. *See* generally C. Thomas Dienes et al., NEWSGATHERING AND THE LAW § 2-3 (2d ed. 1999) (describing the necessary procedural steps that trial courts must take under the various U.S. Supreme Court access decisions).

"[F]or a case-by-case approach to be meaningful, representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper*, 457 U.S. at 609 n.25 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (Powell, J., concurring)). For the "opportunity to be heard" to be meaningful, some notice must be provided before the trial court closes a

courtroom. *See, e.g., United States v. Cojab*, 996 F.2d 1404, 1408 (2d Cir. 1993) (holding that a hearing concerning closure cannot be held before the public has notice that the hearing will take place so that members of the public will have an opportunity to be heard).

For a court to close a proceeding, it must issue specific findings of fact that "closure is essential to preserve higher values [than the constitutional right of access] and is narrowly tailored to serve that interest." *Press-Enterprise II*, 478 U.S. at 13-14. One reason that this procedural component is so important is so "that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise Co. v. Superior Court ("Press-Enterprise I")*, 464 U.S. 501, 510 (1984).

III. The constitutional right of access is equally important in civil litigation as in criminal litigation.

A. The factors that led to a right of access to criminal proceedings are identical for civil proceedings.

This Court has not ruled on whether the right of access applies to civil cases. Nevertheless, its opinions have discussed the similar historical background of both criminal and civil litigation and the similar public policy factors at issue in both criminal and civil litigation.

In *Gannett Co. v. DePasquale*, this Court noted the striking similarities between the history of the public's right to attend civil and criminal trials:

> For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered

> in civil as well as criminal matters" . . . English commentators also assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two.
>
> The experience in the American Colonies was analogous. From the beginning, the norm was open trials. Indeed, the 1677 New Jersey Constitution provided that any person could attend a trial whether it was "civil *or* criminal." . . . Similarly, the 1682 and 1776 Pennsylvania Constitutions both provided that "all courts shall be open."
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> . . .
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> Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. *See, e. g., Dred Scott v. Sandford*, 19 How. 393 [60 U.S. 393 (1856)]; *Plessy v. Ferguson*, 163 U.S. 537 [(1896)]; *Brown v. Board of Education*, 347 U.S. 483 [(1954)]; *University of California Regents v. Bakke*, 438 U.S. 265 [(1978)]. Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.

Gannett, 443 U.S. at 386-87 n.15 (internal citations omitted).

Since the issuance of *Richmond Newspapers* one year after *Gannett*, many members of this Court have noted that both the historical and functional component of the right-of-access framework lead to the conclusion that civil and criminal proceedings should be treated alike. *Richmond Newspapers*, 448 U.S. at 580 n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal